No. 11089

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*,

vs.

JAMES HENRY PACKING COMPANY, a Corporation, *Appellee*.

JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

REPLY BRIEF OF CROSS-APPELLANT, JAMES HENRY PACKING COMPANY

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I.

STATEMENT OF CONSIDERATIONS ACCOMPANYING AMENDMENT TO MAXIMUM PRICE REGULATION 169.

The appendix to the opening brief of the Appellant Administrator is a copy of the Statement of Considerations Accompanying Amendment to Section

1364.406 of Maximum Price Regulation 169 relating to retail markets.

Before directing attention to specific parts of the Statement, cross-appellant reminds the court that, by its answer, it denied that it sold any beef or veal carcasses, or wholesale cuts thereof, as alleged in the complaint, and pleaded affirmatively that the individuals named in Exhibit "A" of the complaint were at all times mentioned therein the employes of cross-appellant.

The Statement of Considerations above referred to accompanied the amendment of August 16, 1943, to Maximum Price Regulation 169. The amendment reads as follows:

> "(c) Any transaction, device or arrangement whereby a person who sells, transfers, or delivers beef or veal to a retail establishment not wholly owned and operated by such person receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited."

The following excerpts from the Statement of Considerations demonstrate that the regulation as amended was not intended to prevent the operation of retail meat markets by a wholesaler:

> "The prohibition does not apply to the ownership and operation of a retail store by a slaughterer or wholesaler."
>
> "The prohibition does not extend to cases where the slaughterer purchases unconditionally a retail establishment and operates the establishment for the sale of meat slaughtered by him. Such

an arrangement cannot be regarded as an evasion of the regulation. The slaughterer assumes the full economic burden of maintaining the retail establishment. Only so long as he discharges that burden in full can he realize the benefits sought. And he assumes the risk of loss should the maintenance of the establishment for any reason become undesirable. The magnitude of the economic risk involved is a sufficient guarantee that the expedient will not be adopted to such an extent as to bring about the consequences previously explained. Moreover, there is precedent in the industry for this type of transaction, precedent which is wholly lacking for the evasive devices which the accompanying amendment expressly prohibits."

One of the "precedents" in the industry is cross-appellant's own retail market in Seattle, which it had owned and operated for many years (Tr. 77).

Cross-appellant did assume

"the full economic burden of maintaining the retail establishment."

We challenge the Administrator to point out a single burden, responsibility or liability of the owner of a retail market which cross-appellant did not assume when it accepted the leases and contracted with the former owners to manage the markets.

II.

FINDINGS OF THE TRIAL COURT THAT WERE CLEARLY ERRONEOUS

Risking repetition of matters contained in our opening brief, we here point out a few of the findings made

by the trial court which are obviously not supported by the evidence.

1. In Finding of Fact III the court found:

> "That on July 30, 1943, said Chief Attorney notified defendant by letter that said modified leases and contracts constituted an evasion of Maximum Price Regulation 169, and again on August 30, 1943, the Chief Enforcement Attorney notified defendant by letter that said leases and contracts were an evasion. * * *"

The "notices" were far from being the absolute and authoritative documents indicated by the court's finding. Mr. Sholley's letter of July 30, 1943, stated:

> "In view of this expression of policy, this office *now is of the opinion* that the proposed leasing arrangements between James Henry Packing Co. and various retail meat markets in the City of Seattle are forbidden evasions of Revised Maximum Price Regulation 169." (Tr. 123)

And Mr. Stoneman's letter of August 30, 1943, stated:

> "Suffice it to say that *in our opinion* the effect of this lease-employment arrangement * * * is for your firm to secure a higher price for its meat than is permitted by Maximum Price Regulation 169." (Tr. 87)

Cross-appellant and its counsel were of a different opinion. They believed that the leases were not evasions. As pointed out in our opening brief, the local office of the Administrator at no time furnished cross-appellant with either an oral or written definitive opinion, but summarily referred the case to its litigation attorneys, while both the Administrator's local office staff and cross-appellant were groping for an interpretation of the regulations.

Under these facts, is cross-appellant now to be condemned as a willful violator of a regulation that was not susceptible of a clear interpretation, because—and only because—of the opinions of Mr. Sholley and Mr. Stoneman, which cross-appellant and its counsel believed wrong?

Said the court in *Bowles v. Simon*, 145 F.(2d) 334:

> "In his brief, counsel for the Administrator says: 'These administrative rulings or interpretations are controlling.' * * * We think counsel's zeal and enthusiasm for the sanctity of such interpretations are hardly warranted. This doctrine would relegate the statutes of Congress to an inferior position unjustified even in these times when the compulsion of an emergency compels us to clothe administrative agencies with extraordinary powers.
>
> "We do not accept the Administrator's view that he may promulgate a regulation and then place on it an interpretation which becomes controlling on the courts. The Administrator has not grown to any such stature. The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them."

Citing *Norwegian Nitrogen Products Co. v. United States*, 53 S. Ct. 350; *Bowles v. Nu Way Laundry Company*, 144 F.(2d) 741.

See also *Administrator v. Southwest Hotels*, 50 F. Supp. 147, wherein the court, in excusing a violation of price ceilings, said:

> "The defendant had to learn a great deal about these regulations and the many requirements un-

der the law and regulations and made an honest and consistent attempt to comply."

2. In its Finding of Fact IV the trial court found:

"That said defendant failed and neglected to take any steps to terminate said leases and contracts until September 24, 1943. * * *"

In making such a finding, the court first assumed that the defendant could terminate the leases and contracts at will without the consent of the other parties, and a reference to the testimony will promptly disclose that upon receipt of the "clarifying amendment" of August 16, 1943, of which the cross-appellant was unable to secure a copy until August 23, 1943, counsel for cross-appellant wrote Chief Attorney Hartson requesting an interpretation, but stating:

"If the Price Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual cancellation."

Cross-appellant thus very promptly announced its intention to seek a termination of the leases upon a declaration by the Price Administrator that they were evasions, and, while it continued to own and operate the markets, it did so with the sincere conviction that it was not violating the regulations. See page 17 of cross-appellant's opening brief for a fuller discussion of this finding.

3. In its Finding of Fact V the trial court found:

"That defendant neither during the life of said leases and contracts nor at any time, filed any applications with the State of Washington for any license to operate said stores, or any of them, as required by the laws of the State of Washing-

ton, nor did it pay any retail sales tax on any sales made by said stores nor make or file any returns showing any sales tax or business tax due said State from said stores as provided by the laws of the State of Washington."

Here is a finding that these retail meat markets were operating without a license and without paying sales tax or business tax. If such a finding were true, these markets would have been in serious difficulties with the State of Washington—and just how could they escape payment of the State sales tax? The concluding paragraph of each lease reads as follows:

> "It is further agreed that said meat market may, at the election of the lessee, be operated under its present name." (Tr. 18)

All markets were operated under their existing names pending the conclusion of details incident to the acquisition of the markets by the cross-appellant, including the completion of store signs, which had been ordered and were in process of manufacture (Tr. 79).

The store license and the payment of the sales and manufacturing tax were the responsibility of the managers under the contract of employment, which required such managers to:

> "manage, direct, and superintend the business of said meat market to the best of his ability, subject at all times to the direction, instructions, and control of first party." (Tr. 19)

In said Finding V the court further found:

> "That defendant never gave to any of said 25 markets any instructions as to the management or as to the books and records kept or to be kept

by said stores, and never authorized any of the obligations incurred by said markets."

This finding is entirely without support in the evidence. The contract of employment itself contains general instructions sufficient for the purpose; but as soon as the leases and contracts were concluded, cross-appellant wrote each manager a letter regarding price ceilings and wage ceilings (Tr. 76) and furnished each market with a printed form upon which to report sales (Tr. 79).

All of these managers were former owners of their respective markets and naturally familiar with operations. Their own earnings depended upon efficient management. Just what instructions the court deemed necessary in addition to the provisions of the contract, the letter with reference to price ceilings and wages and the report form is not apparent from the findings.

In Finding V the court further found:

"That the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before, except that said 25 markets were required to pay defendant a percentage of their gross sales of all meats in addition to the payment of the ceiling or maximum prices fixed by Maximum Price Regulation 169."

This finding was no doubt based on Mr. Joseph's testimony that there was no change in the operation of the stores (Tr. 111), which was emphasized by appellant in its opening brief on page 15. The question was:

"In other words, Mr. Joseph, there was no change in the operation of this store after July

the First, than before July the First, was there, as far as you know?"

Answer: "Any more than that they were supplied well with good meats."

If counsel intended the words "no change in the operation of this store" in his question to refer to ownership or management, it clearly was not so understood by Mr. Joseph, whose answer referred to the physical facts and appearance of the store operation, about which he thought counsel was inquiring, with no allusion to the change of ownership.

In Finding VIII the court found that the defendant received $19,149.64 "in excess of Maximum Price Regulation 169," when, in fact, only 57% of this amount was derived from beef, and said regulation controls only prices of beef (and veal) (Supplemental Stipulation; Tr. 21).

III.

DISCRETION OF THE TRIAL COURT

In his opening brief the Administrator argues that the defendant failed to plead

> "that its violation was neither willful nor the result of failure to take practicable precautions,"

and that the court abused its discretion in not assessing treble damages.

While such a plea would no doubt be proper where the defendant relies only on lack of willful violation and taking practicable precautions under the provisions of the amendment, these pleadings were filed prior to the amendment, and the defendant pleaded

affirmatively (and we think conclusively proved) that it made no *sales* whatever.

Cross-appellant's defense was that the Price Regulation was wholly inapplicable. These questions of pleading and of discretion were carefully considered and disposed of contrary to the Administrator's contention in *Bowles v. Krodel*, 149 F.(2d) 398, wherein it was held that the trial court, in the exercise of its discretion as conferred in the amendment (Stablization Extension Act of 1944—50 U.S.C.A. App. 925(e)), could assess the amount of the overcharge or any amount between the overcharge and overcharge trebled, even if the defendant makes no defense whatever.

In the following cases the court found the violation unintentional and absolved the defendants, to-wit:

Hecht Co. v. Bowles, 64 S. Ct. 587;

Administrator v. El Paso Iron and Metal Co., 141 F.(2d) 938;

Adminisrator v. O'Connor, 141 F.(2d) 1019;

Administrator v. Southwest Hotels, 50 F. Supp. 147.

IV.

FALSE ACCUSATIONS IN ADMINISTRATOR'S BRIEF

> The Administrator's brief is replete with charges of "willful, flagrant, deliberate and intentional violation, accompanied by fraud, concealment and dishonesty."

Such a characterization of the James Henry Packing Company's acts in this case is contemptible. The brief assumes to tell this court that the record and the evidence show fraud, but that is as far as the brief goes. It makes no analysis of—or even any reference to — any part of the record which supports such charges.

If leasing the retail markets constituted a violation of the price control act and regulations, it was certainly *unintentional.* The record conclusively establishes that neither cross-appellant nor its counsel considered the leasing an evasion. Everything that was done was of a beneficial nature. Retail markets were empty of *all* meats and failing by the score. They were unable to obtain meat because the packing plants could not process under the restrictions of the wholesale ceiling prices, there being no ceiling on livestock. Upon the conclusion of the leases, customers of the market were furnished with graded inspected meats at no increase in prices. The arrangement did not contribute to inflation; *it prevented inflation.* After an exhaustive review of the evidence, the trial court, in his decision, said:

> "This defendant, with advice of able counsel, gave thought and consideration to the regulation

without an intent to violate it, but with a desire to comply with it." (Tr. 196)

Obviously, the trial court would not concur in the character assassination written into the Administrator's brief, nor will it find approval in this court.

V.
CONCLUSION

In conclusion, may we point out that none of the following vital matters are discussed in the Administrator's brief:

First, that if there was an evasion by cross-appellant, it could only have occurred after August 16, 1943, the effective date of the amendment to the regulations, prior to which there was no regulation with reference to leasing markets;

Second, that promptly upon securing a copy of the amendment, counsel for cross-appellant wrote the Chief Attorney for the Administrator his opinion that the Henry markets were, within the purview of the amendment, wholly owned and operated by cross-appellant, and asked for an interpretation, which was never furnished;

Third, that by relinquishing all interest in retail sales of beef on September 24, 1943, cross-appellant divorced the operation entirely from Maximum Price Regulation 169, which relates only to beef;

Fourth, that only beef (no veal was handled) is involved in Price Regulation 169 and in this action; only 57% of the profits were derived from beef; therefore, 43% of the amount which the trial court saw

fit to consider an overcharge was derived from other merchandise, in nowise related to Price Regulation 169;

Fifth, that cross-appellant should not be penalized for its failure to terminate the leases and contracts in the inadequate space of time allotted, as cross-appellant was unable to do so without the consent of its lessors and managers, who were profiting from the transaction.

Respectfully submitted,

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